2000

Sorenson's Ranch School and Shaun Sorenson v. Reta D. Oram, Director, State of Utah, Department of Human Services, Office of Licensing : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SORENSON'S RANCH SCHOOL and SHAUN SORENSON,	:	
Appellees,	:	
v.	:	
RETA D. ORAM, DIRECTOR, STATE OF UTAH, DEPARTMENT OF HUMAN SERVICES, OFFICE OF LICENSING	:	Case No. 20000993-CA
Appellant.	:	Priority No. 15

REPLY BRIEF OF APPELLANT STATE OF UTAH

APPEAL FROM AN ORDER DENYING SUMMARY JUDGMENT
ENTERED IN THE SIXTH DISTRICT COURT
IN AND FOR SEVIER COUNTY, STATE OF UTAH,
THE HONORABLE DAVID L. MOWER PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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ARGUMENT

I. UTAH CODE ANN. SECTION 62A-4A-413 DOES NOT DISTINGUISH BETWEEN FELONS WHO PROVIDE SERVICES TO CHILDREN AND THOSE WHO DO NOT.

In their responsive brief, Sorensons argue that Utah Code Ann. section 62A-4a-413 has a two-part test consisting of a "reporting" test and a "services" test. They argue that subsection (1) is separate and distinct from subsection (2) in that the State is required to check the criminal backgrounds of several categories of individuals, but that, regardless of the type of crime, the individuals screened can never be prohibited from employment with a licensed youth program unless they actually provide services to children.

The Sorensons' argument is flawed for several reasons. Their argument is contrary to the basic principles of statutory

construction. This Court is required to harmonize statutes so that no provision becomes meaningless or superfluous. Reedeker v. Salisbury, 952 P.2d 577, 583 (Utah App. 1998); State ex rel. A.B., 936 P.2d 1091, 1094 (Utah App. 1997). As noted in the State's opening brief, the statute, as a whole, becomes meaningless if the statute is interpreted so that the only pertinent criminal background is that of a "services provider" in a program. Had the legislature only intended for providers of services to be affected, it could clearly have specified that intent. It is unreasonable to assume that the legislature would require the State to screen the criminal background of every employee, in every program, if the State's authority to take action is limited to service providers. Instead, the legislature required that every individual with a close association with a program must be screened and, if an individual has a felony conviction, that person is prohibited from further association with the program.

Another flaw in the Sorensons' argument is their claim that subsection (2) sets forth "five enumerated services" that a felon is prohibited from providing. Subsection (2) sets forth the types of programs and individual activities that the Office of Licensing is responsible for licensing. Child placing services are done either through a program or on an individual basis. See Utah Code Ann. § 62A-4a-601, et seq. (Supp. 2000). Foster care is provided by individual families. Substitute or

institutional care is provided in group homes or institutions. A youth program is an entity that provides a myriad of services and functions, just as a child placing agency or a group home. See Utah Code Ann. section 62A-2-101(20) (Supp. 2000). It is not an "enumerated service" as described by Sorensons in their argument. The Sorensons attempt to equate the specified services provided within a program with the program itself. A youth program is not simply a specified service within an entity – it is the entity being licensed. Thus, subsection (2)'s reference to a youth program is a reference to the entity as a whole, not to specified services provided to children within the context of the program.

Furthermore, the legislative intent as to the language "provide youth programs" is even clearer in light of the State's responsibilities. The Office of Licensing has long been responsible for monitoring various aspects of the programs it licenses, not just the aspect of services to children. Utah Code Ann. section 62A-2-106 requires Licensing to set standards for basic health and safety, which includes a variety of activities not related to "direct services" to children, such as fire and food safety, safety of the physical plant, medical standards and procedures, emergency preparedness, etc. It is significant to note that the final item on the list of standards to be set is for "consumer safety and protection." See Utah Code Ann. § 62A-2-106(1) (Supp. 2000). Clearly, the phrase "provide

youth programs" refers to the whole program, not simply "direct services" to children within the program.

The Sorensons' interpretation of the statute -- adopted by the trial court -- is fundamentally flawed because it imports language into the statute that does not presently exist, such as "direct services to children." Furthermore, the erroneous interpretation merges, and thereby renders meaningless, the terms "employees" and "providers of care." Finally it fails to harmonize the statutory provisions so that the statute makes sense as a whole.

II. RECENT LEGISLATIVE AMENDMENTS SUPPORT THE STATE'S INTERPRETATION OF THE STATUTE.

The Sorensons argue that certain recent legislative amendments support their interpretation of the statute that only felons who provide direct services to children are prohibited in a licensed program. The Sorensons claim that the 1995 substitution of "provide" for "employed by" in section 62A-4a-413(3) supports the argument that provision of services to children is the correct meaning of "provide youth programs," and that "provide" is actually more restrictive than "employed by."

However, the amendments actually support the State's interpretation in light of what is considered a "program" subject to State monitoring and regulation. See Utah Code Ann. § 62A-2-106 (Supp. 2000). When any individual or entity "provides" a

youth program, as noted above it is not limited to services to the children/consumers. The "provision" of a youth program involves the physical aspects of the building in which the program exists, as well as food safety, medical and emergency preparedness procedures, and, generally, consumer safety and protection. Id. Thus, "providing" a youth program is a much broader concept than "being employed by" a youth program, and the recent legislative amendments clarifying that language are supportive of the State's interpretation.[1]

III. THE STATE'S INTERPRETATION OF THE STATUTE IS CONSISTENT WITH STATUTORY CONSTRUCTION PRINCIPLES.

In Point III of their responsive brief, Sorensons' argue that the statute is unambiguous and, therefore, the State erred

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[1] As noted in the State's opening brief, members of a governing body do not, by definition, provide direct services to consumers/children in a program. See Utah Admin. Code, R501-2-3 (attached as Addendum B). Despite that fact, the legislature included members of a governing body as individuals for whom the State must complete criminal history screening. Given that such individuals were never contemplated as "direct service providers," the legislature clearly was concerned about their access to children in the programs, as well as their influence over the programs as policymakers. Sorensons' statutory interpretation is flawed because it suggests that the legislature included the requirement to screen the criminal history of members of a governing body knowing such screening would never be used. Given the scope of the State's monitoring and regulation responsibilities, members of governing boards "provide youth programs" by setting policy, facilitating training, and ensuring compliance with legal requirements. They do not, however, provide direct services to children. Sorensons' interpretation of the statute would render the governing board members' criminal screening meaningless contrary to statutory construction principles.

in providing this Court with pertinent legislative history. The State provided this instructive legislative history to the Court because the sole dispute on appeal is the meaning and intent of the statute. Given that the parties each claim the statute is unambiguous, while asserting contrary interpretations, it is entirely appropriate for this Court to review legislative history.[2]

In Point IV of their brief, Sorensons claim that their statutory interpretation does not render the terms "employee" and "provider of care" superfluous, as the State asserted in its opening brief. (See State's Opening Brief at Point I A., pp. 8-11). In response to the State's assertion that legislature would not have included both "providers of care" and "employees" if only one category was relevant, the Sorensons' sole argument is that an owner or director might not submit to criminal screening if the term "employee" is not included in the list. (Appellees'

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[2] Sorensons also claim that the State Office of Licensing has manipulated its policy/rules after this action began in order to further its "political agenda." (Appellees' Brf. at 18-19). They suggest that Licensing deleted "provide direct services for children" and substituted "performs services for a licensee" in an attempt to strengthen its argument in the courts. In fact, the legislature enacted several new statutes shortly after this action began which shed more light on the need for a rule change. See Utah Code Ann. § 62A-2-101(13), -120 (1997 and Supp. 1998) (new criminal background screening statute added which focuses on "persons associated with a licensee" and defining those persons as owners, directors, members of the governing body, employees, providers of care and volunteers). It is significant to note that the legislature focused on the "associations" with the licensee, not the direct contact or associations with the children in the programs.

Br. at 20-21). The flaw in Sorensons' argument is that owners and directors are already required to submit to such screening, and do not have to be an "employee" or a "provider of care" in order to be expected to comply with the requirement. Other than that one argument, the Sorensons' cannot answer the question raised by their flawed interpretation of the statute, which is: if the legislature intended to prohibit only felons who provide direct services to children from association with licensed programs, then why list both "employees" and "providers of care" in the statute? The reason Sorensons' interpretation cannot resolve the question is that the statutory provisions are only in harmony when the State's interpretation is adopted.[3] Given that statutory provisions must be interpreted harmoniously and so that no parts are rendered meaningless or superfluous, the trial court erred in its statutory interpretation (adopting the Sorensons' interpretation) which rendered the use of the separate and distinct terms "employees" and "providers of care" meaningless.

CONCLUSION

Based on the foregoing arguments, as well as the State's arguments contained in its opening brief, the State respectfully requests that this Court reverse the trial court's grant of

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[3] The Sorensons claim in passing that "[b]oth terms were necessary because some employees provide services to the children . . . but are not 'providers of care.'" This assertion has no support in either reality or in the law.

summary judgment in favor of Appellees and grant judgment in favor of the State based on the correct interpretation of section 62A-4a-413.

DATED this 16th day of July, 2001.

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CERTIFICATE OF MAILING

I hereby certify that on the 16th day of July, 2001, I caused to be mailed, postage prepaid, two true and exact copies of the Reply Brief of Appellant State of Utah to the following:

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ADDENDA

ADDENDUM A

(f) one individual who represents substance abuse services licensees; and

(g) three individuals who represent clients or the general public.

(2) (a) Except as required by Subsection (2)(b), as terms of current board members expire, the executive director shall appoint each new member or reappointed member to a four-year term.

(b) Notwithstanding the requirements of Subsection (2)(a), the executive director shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every two years.

(c) The board shall annually elect a chair from its membership.

(3) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(4) The licensing board shall meet at least quarterly, or more frequently as determined by the director, the chair, or three or more members of the board. Five members constitute a quorum and a vote of the majority of the members present constitutes the action of the board.

(5) (a) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(b) Members may decline to receive per diem and expenses for their service. 1998

62A-2-105. Licensing board responsibilities.

(1) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the licensing board shall review and approve rules regarding:

(a) approving, denying, suspending, and revoking licenses for human services licensees and facilities;

(b) conditional licenses, variances from department rule, and exclusions;

(c) the protection of the basic health and safety of clients; and

(d) licensing of all human services licensees that are required to be licensed under this chapter.

(2) The licensing board shall:

(a) define information that shall be submitted to the department with an application for a license;

(b) review and approve fees, in accordance with Section 63-38-3.2, for licenses issued under this chapter;

(c) represent the community and the human services licensees; and

(d) advise the department as requested, concerning enforcement of rules established under this chapter. 1998

62A-2-106. Office responsibilities.

The office shall:

(1) make rules to establish:

(a) basic health and safety standards for licensees, which shall be limited to the following:

(i) fire safety;

(ii) food safety;

(iii) sanitation;

(iv) infectious disease control;

(v) safety of the physical plant;

(vi) transportation safety;

(vii) emergency preparedness;

(viii) the administration of medical standards and procedures, consistent with the related provisions of this title; and

(ix) consumer safety and protection;

(b) minimum administration and financial requirements for licensees; and

(c) guidelines for variances from rules established under this Subsection (1);

(2) enforce rules:

(a) approved by the licensing board;

(b) in effect on January 1, 1998, that apply to a service or program for which a licensee is not under contract with a division listed in Section 62A-1-105 to provide until rules are established pursuant to Subsection (2)(c); and

(c) established after July 1, 1999, by a policymaking board created by Section 62A-1-105 which:

(i) shall be limited to:

(A) the administration and maintenance of client and service records;

(B) staff qualifications; and

(C) staff to client ratios; and

(ii) may only apply to a service or program for which a licensee is not under contract with a division listed in Section 62A-1-105 to provide;

(3) issue licenses in accordance with this chapter;

(4) conduct surveys and inspections of licensees and facilities in accordance with Section 62A-2-118;

(5) collect licensure fees;

(6) provide necessary administrative support to the licensing board;

(7) investigate complaints regarding any licensee or facility;

(8) have access to all records, correspondence, and financial data required to be maintained by a licensee or facility;

(9) have authority to interview any client, family member of a client, employee, or officer of a human services licensee or facility; and

(10) have authority to revoke, suspend, or extend any license issued by the department under this chapter by following the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act. 1999

62A-2-106.1, 62A-2-107. Repealed. 1998

62A-2-108. Licensure requirements — Expiration — Renewal.

(1) Except as provided in Section 62A-2-110, no person, agency, firm, corporation, association, or governmental unit, acting severally or jointly with any other person, agency, firm, corporation, association, or governmental unit, may establish, conduct, or maintain a human services program or facility in this state without a valid and current license issued by and under the authority of the department as provided by this chapter and the rules of the licensing board.

(2) No license issued under this chapter is assignable or transferable.

(3) A current license shall at all times be posted in each human services program or facility, in a place that is visible and readily accessible to the public.

(4) (a) Each license issued under this chapter expires at midnight 12 months from the date of issuance unless it has been:

(i) previously revoked by the office; or

(ii) voluntarily returned to the office by the human services licensee.

(b) A license shall be renewed upon application and payment of the applicable fee, unless the office finds that the licensee or facility has not complied with the provisions of or rules made under this chapter.

(5) Any licensee or facility which is in operation at the time rules are made in accordance with this chapter shall be given a reasonable time for compliance as determined by the rule. 1998

ADDENDUM B

R501-2-3. Governance.

A. The program shall have a governing body which is responsible and has authority over the policies, training and monitoring of staff and consumer activities for all phases of the program. Their responsibilities shall include the following:

1. to ensure program policy and procedures compliance,

2. to ensure continual compliance with relevant local, state and federal requirements,

3. to notify the Office within 30 days of changes in program administration and purpose, according to R501-2-2.

4. to ensure that the program is fiscally and operationally sound,

5. to ensure that the program has adequate staffing as identified on the organizational chart,

6. to ensure that the program has general liability insurance, professional liability insurance as appropriate, vehicle insurance for transport of consumers, and fire insurance, and

7. for programs serving youth, the program director or designee shall meet with the Superintendent or designee of the local school district at the time of initial licensure, and then again each year as the programs renews it's license to complete the necessary student forms including youth education forms.

B. The governing body shall be:

1. a Board of Directors in a non-profit organization; or

2. commissioners or appointed officials of a governmental unit; or

3. Board of Directors or individual owner or owners of a for-profit organization, and

4. for Child Placing Adoption Agencies, a Board of Directors. The Board members shall not be owners, employees, or paid consultants of the agency.

C. The program shall have a list of members of the governing body, indicating name, address and term of membership.

D. The program shall have an organization chart which identifies operating units of the program and their inter-relationships. The chart shall define lines of authority and responsibility for all program staff.

E. When the governing body is composed of more than one person, the governing body shall establish written by-laws, and shall hold formal meetings at least twice a year, Child Placing Agencies must meet at least quarterly, maintain written minutes, which shall be available for review by the Office, to include the following:

1. attendance,
2. date,
3. agenda items, and
4. actions.